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14  
15 **UNITED STATES DISTRICT COURT**  
16 **NORTHERN DISTRICT OF CALIFORNIA**  
17 **SAN FRANCISCO DIVISION**

18 FEDERAL TRADE COMMISSION,  
19  
20 Plaintiff,

21 v.

22 MICROSOFT CORP.,  
and  
23 ACTIVISION BLIZZARD, INC.

24 Defendants.

CASE NO. 3:23-cv-02880-JSC

**DEFENDANT ACTIVISION BLIZZARD,  
INC.'S STATEMENT IN RESPONSE TO  
PLAINTIFF FEDERAL TRADE  
COMMISSION'S ADMINISTRATIVE  
MOTION TO CONSIDER WHETHER  
ANOTHER PARTY'S MATERIAL  
SHOULD BE SEALED (Civil L.R. 79-5(f))  
[ECF NO. 132]**

Judge: Honorable Jacqueline S. Corley

## **I. INTRODUCTION**

Pursuant to Civil Local Rules 7-11 and 79-5(f)(3), Activision Blizzard, Inc. (“Activision”) respectfully requests that the Court maintain under seal its confidential information identified below, which was provisionally filed under seal pursuant to Plaintiff Federal Trade Commission’s (hereinafter “FTC” or “Plaintiff”) Administrative Motion to Consider Whether Another Party’s Materials Should Be Sealed (the “Administrative Motion”) (ECF No. 132). For the reasons described below and in the Declaration of Page Robinson (the “Robinson Decl.”) attached hereto, Activision respectfully requests that the Court consider this submission, which narrows the information that would be maintained under seal within the FTC’s Reply to Defendants’ Opposition to Preliminary Injunction Motion (ECF No. 131) (“Reply”).

The proposed sealing in the chart below reflects Activision’s good-faith efforts to narrowly seek sealing of only that information which is competitively sensitive and contained in internal documents, the public disclosure of which would cause injury to Activision that cannot be avoided through any less restrictive alternative means.

| <b>Document</b> | <b>Portions to Be Filed Under Seal</b> | <b>Designating Party</b> | <b>Basis for Sealing Request</b>  |
|-----------------|--|--------------------------|---|
| Reply           | Page 11, Portions of Lines 13-14       | Activision               | This text contains non-public and highly sensitive information including, but not limited to, information reflecting strategic evaluation of forward-looking opportunities, business partnerships, and internal business strategy, which could be used to injure Activision if made publicly available. |

| Document | Portions to Be Filed Under Seal         | Designating Party       | Basis for Sealing Request   |
|----------|---|-------------------------|---|
| Reply    | Page 11, Portions of Lines 17-18        | Activision <sup>1</sup> | This text contains non-public and highly sensitive information including, but not limited to, information reflecting strategic evaluation of forward-looking opportunities, business partnerships, and internal business strategy, which could be used to injure Activision if made publicly available.                                     |
| Reply    | Page 11, Portions of Lines 19-20, 22-24 | Activision              | This text contains non-public and highly sensitive information including, but not limited to, information reflecting internal decision-making processes, strategic evaluation of forward-looking opportunities, business partnerships, and internal business strategy, which could be used to injure Activision if made publicly available. |

### **ARGUMENT**

#### **I. Sealing Activision's Confidential Business Information Contained in the Reply Is Warranted Under Ninth Circuit Precedent**

<sup>1</sup> While the FTC's Administrative Motion states that this portion contains Nvidia's confidential information, *see* Admin. Mot. at 3, the content of this portion also reflects confidential information about Activision.

1 In the Ninth Circuit, “[p]arties seeking to seal judicial records relating to motions that are  
 2 ‘more than tangentially related to the underlying cause of action,’ bear the burden of overcoming  
 3 the presumption with ‘compelling reasons supported by specific factual findings that outweigh the  
 4 general history of access and the public policies favoring disclosure.’” *Lenovo (United States) Inc.*  
 5 *v. IPCom GmbH & Co., KG*, 2022 WL 2313948, at \*1 (N.D. Cal. Jun. 28, 2022); *see also*  
 6 *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (“[T]he court must  
 7 ‘conscientiously [] balance the competing interests’ of the public and the party who seeks to keep  
 8 certain judicial records secret.”). Courts in this Circuit regularly find that sealing is warranted  
 9 where the records or information that are sought to be sealed could be used “as sources of business  
 10 information that might harm a litigant’s competitive standing.” *Nixon v. Warner Commc’ns, Inc.*,  
 11 435 U.S. 589, 598 (1978); *see also In re Elec. Arts, Inc.*, 298 F. App’x 568, 569 (9th Cir. 2008)  
 12 (same); *Velasco v. Chrysler Grp. LLC*, No. CV 13-08080 DDP (VBK), 2017 WL 445241, at \*2  
 13 (C.D. Cal. Jan. 30, 2017) (stating that “district courts in this Circuit have sealed records containing  
 14 ‘information about proprietary business operations, a company’s business mode or agreements with  
 15 clients,’ [and] ‘internal policies and strategies’”) (internal citations omitted).

16 “The Ninth Circuit has explained that ‘in general, compelling reasons sufficient to outweigh  
 17 the public’s interest in disclosure and justify sealing court records exist when such court files might  
 18 have become a vehicle for improper purposes, such as the use of records to . . . release trade  
 19 secrets.’” *Velasco*, 2017 WL 445241, at \*2 (quoting *Elec. Arts*, 298 F. App’x at 569); *see also*  
 20 *Elec. Arts*, 298 F. App’x at 569 (“A ‘trade secret may consist of any formula, pattern, device or  
 21 compilation of information which is used in one’s business, and which gives him an opportunity to  
 22 obtain an advantage over competitors who do not know or use it.’”) (citation omitted). A court has  
 23 “broad latitude” to grant protective orders to prevent disclosure of “many types of information,  
 24 including, but not limited to, trade secrets or other confidential research, development, or  
 25 commercial information.” *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206,  
 26 1211 (9th Cir. 2002).

27 In determining whether a document should be filed under seal, courts consider, among  
 28 other things, the measures taken to guard the information’s secrecy and the value of the

information to the business or its competitors. *E.g., Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002). Here, Activision seeks to seal three narrowly tailored excerpts of the Reply which reference and reflect, among other things, confidential, proprietary information relating to Activision’s internal decision-making processes, strategic evaluation of forward-looking opportunities, business partnerships, and internal business strategy. The disclosure of this information could be used to injure Activision if made publicly available.

**II. Sealing the Reply Is Necessary to Protect Activision’s Confidential and Proprietary Business Information**

Activision seeks to maintain under seal three portions of the Reply, as they contain Activision’s non-public and highly sensitive information from documents obtained during the course of the FTC’s investigation and during litigation discovery. Robinson Decl. ¶¶ 4–6. Examples of such confidential information include, but are not limited to, information reflecting internal decision-making processes, strategic evaluation of forward-looking opportunities, business partnerships, and internal business strategy. *Id.* ¶¶ 4. Activision takes robust measures to maintain the confidentiality of all the above-described information and does not disclose it publicly. *Id.* ¶ 6. Disclosure of this information would provide Activision’s competitors with private information about Activision’s performance and internal business strategy, which could harm Activision’s competitive standing. *Id.* ¶ 6; *see Cont’l Auto. Sys. v. Avanci, LLC*, No. 19-cv-02520-LHK, 2019 WL 6612012, at \*4 (N.D. Cal. Dec. 5, 2019). Thus, the unsealing of this highly confidential and sensitive information would cause injury to Activision that cannot be avoided through less restrictive alternatives. *See* Robinson Decl. ¶ 5.

Finally, Activision provided the FTC with the confidential business information cited in the Reply pursuant to the statutory and regulatory guarantees of confidentiality contained in the Hart-Scott-Rodino Act or the FTC Act. *Id.* ¶ 7; *see also* 15 U.S.C. §§ 18a(h), 46(f), 57b-2(b), 57b-2(c); 6 C.F.R. § 4.10(d)-(g). In similar cases, the FTC has acknowledged the need to maintain the confidentiality of a party’s confidential business information that has been provided to the FTC via a regulatory request. *See, e.g., FTC v. Lockheed Martin Corp.*, 2022 WL 1446650, at \*2 (D.D.C. Jan. 25, 2022) (“According to the FTC, sealing the complaint is appropriate . . . because the filing

includes confidential information submitted . . . pursuant to ‘statutory and regulatory guarantees of confidentiality.’ . . . The requested sealing covers only confidential information and is, according to the FTC, required by regulation.”).

### III. Conclusion

As stated above, compelling reasons justify sealing Activision’s confidential business information contained within the Reply, and Activision respectfully requests that this Court grant the FTC’s Motion to Seal (ECF No. 132), consistent with the specific recitations stated herein. In accordance with Civil Local Rule 7-11, Activision has also filed a Proposed Order herewith.

DATED: June 27, 2023

By: /s/ Caroline Van Ness

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